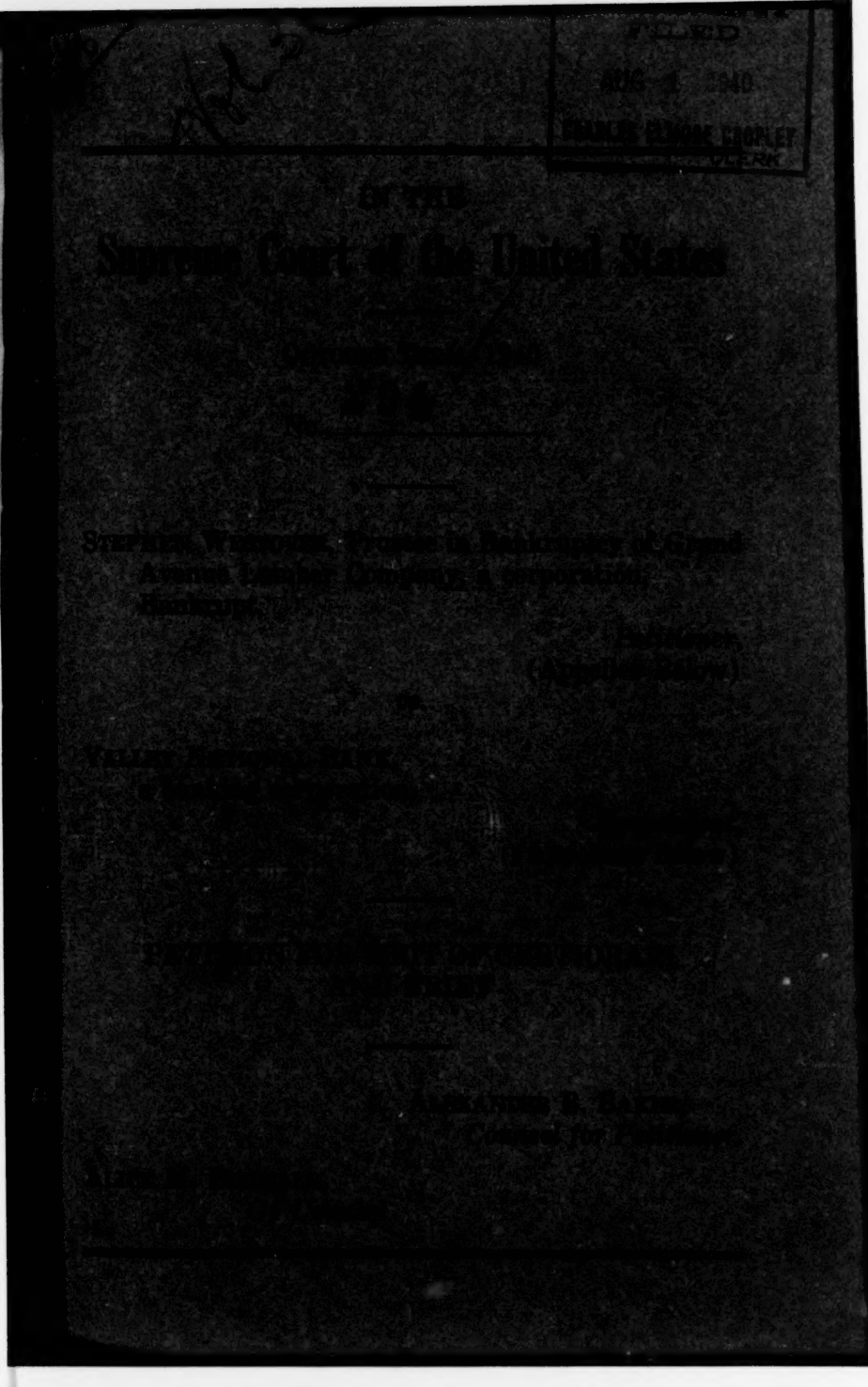

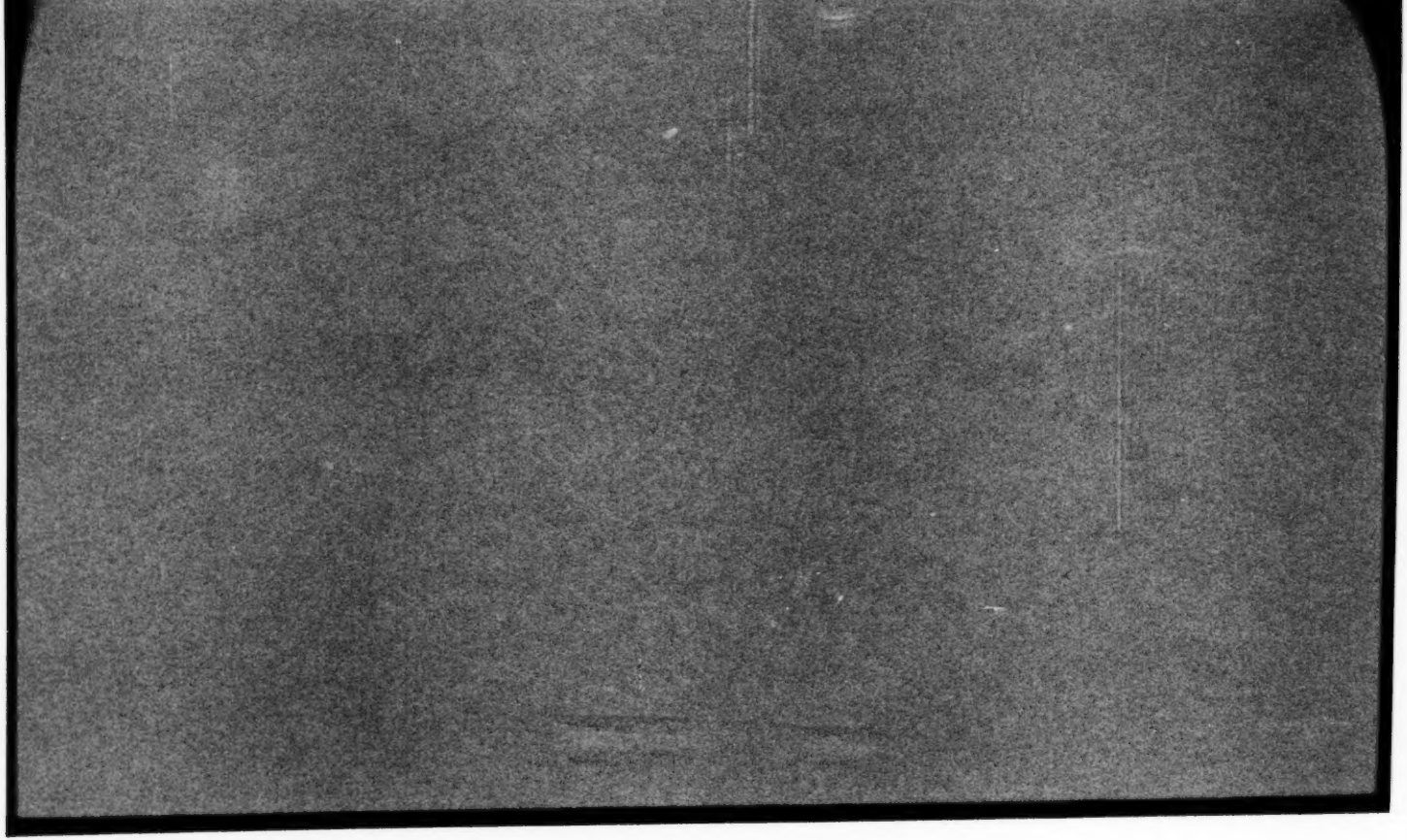

INDEX

AUTHORITIES CITED

STATUTES CITED

RULES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No.....

STEPHEN WESTOVER, Trustee in Bankruptcy of Grand Avenue Lumber Company, a corporation, Bankrupt,

Petitioner,
(Appellee Below)

vs.

VALLEY NATIONAL BANK, a banking corporation,

Respondent,
(Appellant Below)

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE CIRCURT COURT OF APPEALS FOR THE NINTH CIRCUIT.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The petition of Stephen Westover, trustee in bankruptcy, respectfully shows to this Court as follows:

This is a petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, upon the ground that the questions presented are of grave importance to the public and especially to creditors, in the interest of fair and equitable ad-

ministration of bankrupt estates, involving the construction of the Bankruptcy Act, the Circuit Court of Appeals having reversed the judgment of the trial court based upon findings of all the facts necessary to sustain recovery of a voidable preference in an action tried without a jury, and promulgated an erroneous rule by holding that a trustee in bankruptcy *must*, in order to recover a voidable preference, establish knowledge of the one receiving the transfer *that it was intended as a preference*, notwithstanding the plain and unambiguous language of Section 60b of the Bankruptcy Act of 1898, as amended to June 26, 1936, (being the law in effect at the time of the transfer) that the transfer may be avoided by the trustee if the one receiving it has reasonable cause to believe the enforcement of the transfer would effect a preference.

The several reasons relied upon are set forth with more particularity hereinafter.

A certified copy of the proceedings in the District Court and the Circuit Court of Appeals is presented herewith. References to same are indicated by the designation (Tr.).

PRELIMINARY STATEMENT

On an involuntary petition in bankruptcy, filed on January 12, 1938, the Grand Avenue Lumber Company, a corporation, was adjudicated bankrupt on February 3, 1938 and on February 19, 1938, Stephen Westover was appointed and qualified as trustee (Tr. 3). From November 22, 1937 up to the bankruptcy, the company was in the hands of a receiver appointed by the Superior Court of Maricopa County, Arizona, in a suit brought against it on that day by the Arizona Concrete Company, a corporation of which, S. B.

Shumway, the president and controlling stockholder of the bankrupt, was vice president and also controlling stockholder, the suit being filed upon his instructions (Tr. 292).

On September 23, 1938 the trustee in bankruptcy instituted suit in the United States District Court of Arizona against the Valley National Bank to recover as voidable preferences two payments made to the bank by the bankrupt, one on October 13, 1937, for $3,040 and one on November 22, 1937 for $3532.99, both payments being on notes not due at the time, and together covering payment of all indebtedness to the bank (Tr. 2, 8). The case was tried to the court, without a jury, and on July 11, 1939, judgment was entered and filed in favor of the trustee for the full amount asked, based on findings of fact covering all the elements of voidable preference (Tr. 37-46).

Motion for new trial was filed by the bank and denied October 19, 1939 (Tr. 50). No petition for amendment of the findings was filed by the bank. Appeal was taken by the bank, and the Circuit Court of Appeals on May 22, 1940 rendered its opinion and entered its judgment reversing the judgment of the trial court and entering judgment for the bank (Tr. 345). Motion for rehearing was filed by the trustee in due time, and on June 19, 1940, the same was denied, the order directing a modification of the opinion, but making no change in the judgment (Tr. 346). The court, however, on application granted a stay of proceedings on the mandate, pending the decision on an application to be made to this Court for a Writ of Certiorari (Tr. 347). The opinion is reported in 112 Fed. (2) 61 (Advance Sheets, Vol. 1, July 8, 1940).

STATEMENT OF MATTERS INVOLVED

The case was tried to the court below without a jury, a jury having been waived by the parties by stipulation, and the trial court made written findings of fact and conclusions of law based thereon. Objections to said findings were not filed within the time required by Rule 21, District Court Rules, District of Arizona. No request to amend the findings was made by appellant under the provisions of Rule 52 (b) of the Federal Rules of Civil Procedure.

The trial court entered judgment in favor of the trustee in bankruptcy of Grand Avenue Lumber Company, a corporation, and against the Valley National Bank, of Phoenix, Arizona, for recovery of preferential payments made to said bank within four months prior to the adjudication in bankruptcy and entered written findings of fact covering all the elements of voidable preference, including finding XIII, reading as follows:

> "That at the time said payments were made by said Grand Avenue Lumber Company, a corporation, to said Valley National Bank on, to-wit, October 13, 1937, and November 22, 1937, the said Valley National Bank had reasonable cause to believe that the said Grand Avenue Lumber Company, a corporation, was insolvent, and that the said payments of said amounts to it would enable it to receive a greater percentage of its debt than some other creditors of said Grand Avenue Lumber Company, a corporation, of the same class;" (Tr. 25)

Appellant, in its statement of points on which it intended to rely on appeal, challenged this finding, among others, in the following manner:

"That the trial court erred in Finding of Fact Number XIII, by finding that The Valley National Bank had reasonable cause to believe that the Grand Avenue Lumber Company, a corporation, was insolvent on October 13, 1937, and November 22, 1937, or on either of said dates, *for the reason that it had every reason to believe that Shumway, who was not insolvent, was standing back of the Grand Avenue Lumber Company.*" (Italics ours) (Tr. 332)

The United States Circuit Court of Appeals, in its opinion filed May 22, 1940, and as modified June 19, 1940, reversed the judgment and ordered judgment for appellant upon the following ground:

"The judgment must be reversed and judgment awarded the appellant upon the ground that the trustee has failed to establish *knowledge*, actual or constructive, *of the bank* that the payments made to it *were intended as a preference.*" (Italics ours) (Tr. 344)

In the situation of this record the appellate court could only review the sufficiency of the evidence to support the judgment as provided in Rule 52, Federal Rules of Civil Procedure. The reversal of the judgment as will be noted is grounded entirely upon the alleged failure of the trustee in bankruptcy to establish *one* element of voidable preference required by the Bankruptcy Act, being that part of Section 60b of the Bankruptcy Act, as amended to June 26, 1936, in effect in the year 1937, italicized in the following excerpt therefrom:

"And if at the time of the transfer * * * the bankrupt be insolvent and the judgment or trans-

> fer then operate as a preference, *and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference,* it shall be voidable by the trustee."

Since the insolvency of the bankrupt at the time of the payments must be conceded, and is not questioned in the opinion, the only element of voidable preference upon which the appellate court presumes to have found the proof insufficient was Finding of Fact XIII of the trial court, cited above, by the wrongful construction that it placed on the provision of the Bankruptcy Act above cited, with respect to proof thereof.

In giving its ground for reversal the court clearly placed upon the trustee the wholly unnecessary and difficult burden of proving knowledge, actual or constructive, on the part of the bank or its agent *that the payments were intended as a preference.* This was clearly erroneous.

From and after the amendment in 1903 to the Bankruptcy Act of 1898, it was necessary in order to make a preference voidable to show that the creditor *had reasonable cause to believe that a preference was intended.* However, in 1910 the Bankruptcy Act was amended to read as above stated and the transfer *is voidable by the trustee without regard to the factor of intent.*

It is very apparent from many statements all through the opinion that the reviewing court was construing the burden placed upon the trustee in the light of the requirements of the Bankruptcy Act *prior to*

1910 and the consideration of cases submitted in appellant's brief which were decided under the provisions of the law prior to its change in 1910 and which emphasized the necessity of proving "intent" in order to establish voidable preference.

It is also apparent that the court placed upon the trustee the burden of proving *knowledge* by the bank of the insolvency of the debtor, rather than the requirement of the statute of "reasonable cause to believe." This, too, is clearly erroneous.

The statement of the court in its opinion (Tr. 339) that "two circumstances are strongly relied upon by the trustee to sustain the finding of the trial court that the appellant knew that the bankrupt was insolvent when it accepted payment," after which these "two circumstances" are presumably set forth and reviewed, does not fairly state the record. In the first place, the finding was, in the language of the Bankruptcy Act, that the appellant "had reasonable cause to believe" the Grand Avenue Lumber Company was insolvent, a vastly different matter from *knowledge*, and in the second place, not only were there *numerous other circumstances* on which reliance was placed, but these two circumstances are not stated strictly in accordance with the evidence, many of their essential elements from which inferences would naturally flow having been emasculated in their narration.

The trustee showed by undisputed evidence in the record the following facts sufficient to put the bank, through Carl Gibson, its agent in the transaction, on inquiry which would have revealed the company was hopelessly insolvent at the time of the payments.

The Grand Avenue Lumber Company was a corporation which was organized and started business in Phoenix, Arizona during July, 1936. S. B. Shumway was the president of the company and its controlling stockholder (Tr. 106). The company engaged in a general lumber and contracting business in a small way. The entire paid up capital stock of the corporation was $3625.00 (Tr. 210). In July, 1936 the company commenced borrowing money from the Valley National Bank, two loans being made during July and August of that year which were paid. In September, 1936, two more loans in the amount of $500.00 each were made without security or co-maker, these loans being paid at maturity (Tr. 154, 155). In the spring of 1937, about May 1st, the company began to go into the expansion of building homes under the F. H. A. and of making sales campaigns expanding business with little or no margin of profit and from that time on, according to the testimony of a certified public accountant, the concern lost money (Tr. 209). In the spring of 1937, S. B. Shumway told at least one creditor that he was going to get a loan of about $20,000 from the Valley National Bank in order to put more money into the business as there was not enough capital in the business (Tr. 184). The company continued to borrow money from the Valley National Bank, but commencing in March, 1937, the loans were in considerably larger amounts and from that time loans were made in varying amounts but no loans were made *except with S. B. Shumway as co-maker.* The indebtedness varied from $3500 up to as much as $6500. This indebtedness was all paid during the fall of 1937, one payment on October 13, 1937, paying a note of $3,000, which note the records showed was not due until No-

vember 13, 1937, and another payment of $3532.99 paid on November 22, 1937, paying a two thousand dollar note and a fifteen hundred dollar note, neither of which were due at the time of payment (Tr. 155). The last two payments which it is contended were preferential were the only payments shown on the loan sheet of the bank to have been made before the notes were due (Tr. 314). The bankrupt estate could not pay other unsecured creditors in full (Tr. 168).

All credit relations between the bankrupt and the bank during the entire period were through its president, S. B. Shumway, and Carl Gibson, the vice president of the Valley National Bank (Tr. 292). No other officer or employee of the bank had any "contact" with the Grand Avenue Lumber Company or with S. B. Shumway in connection with loans or payments (Tr. 308, 311).

S. B. Shumway testified as follows:

> "Q. Mr. Shumway, with whom at the Valley Bank did you have credit relations; with what officer of the Valley Bank was your credit as President of the Grand Avenue Lumber Company, for the Grand Avenue Lumber Company? With whom did you discuss your transactions?
>
> "A. I discussed *all my business and the business I did and any concern I did business with, with Mr. Carl Gibson at that time.*" (Tr. 292) (Italics ours)

An audit was made up for the Grand Avenue Lumber Company for the fiscal year ending July 1st, 1937, which showed profits of $9,000 and on which a dividend of that amount was paid, but this audit did not

correctly state the profits. Matters showing its true condition were all revealed on the books of the company (Tr. 214). Income tax was paid on only $4200 instead of $9,000 (Tr. 213). This audit was in the files of the Valley National Bank during the fall of 1937. It showed what a creditor of the company stated as a "complicated" situation regarding accounts receivable and accounts payable (Tr. 296, 297).

During the summer of 1937 Shumway went to California for a vacation and before leaving arranged with Carl Gibson for loans to take care of current expenses during the summer and left *with Carl Gibson at the bank* blank notes signed by him, as president of the company, and individually (Tr. 111). Shumway directed Wright, the manager and treasurer of the company, if the bank account got low and money was needed to pay current expenses to go to the bank, get the necessary notes from Gibson, sign them as treasurer of the company, and deposit the money to the account of the Company (Tr. 111). On August 12, 1938, Wright went to the bank and saw Gibson, told him money was needed for current expenses and Gibson gave him two one thousand dollar notes already signed by Shumway, which Wright signed, and then deposited the amount of $2,000 to the account of the company on that date (Tr. 112). This was less than six weeks after the "audit" of June 30, 1937, was made upon which a dividend of $9,000 had been paid, —the greater part to Shumway,—out of "reputed" profits.

A few days *after August 12th*, 1937 Gus E. Engstrom, manager of the Arizona Sash, Door & Glass Company, a creditor of the Grand Avenue Lumber

Company, went to the bank and talked with Carl Gibson as an officer of the bank to try to find out the financial condition of the Grand Avenue Lumber Company, stating he was worried about his account and could get no satisfaction from Wright or Shumway. Engstrom's testimony as to his conversation with Carl Gibson on that occasion is as follows:

> "Why, I told Mr. Gibson that the Grand Avenue Lumber Company owed us a considerable account and that I was not able to get any satisfaction from Mr. Shumway or Mr. Wright as to payment, and that we were considering taking some action to collect that account and I would appreciate any information he could give me as to their financial standing. He then asked me how much the Grand Avenue Lumber Company owed us and I told him it was approximately $3,000.00. He said, *That is entirely too much, and there are several other accounts that are in the same condition.* I then asked him if we took action, in his opinion, did he think we could collect that amount? He said, 'I would suggest you would not do anything about it right now. Mr. Shumway is in California. *I will get in touch with him and have him come over here* and see if he won't put your account in better condition'. I said, 'When will you do that?' He said, 'At once', and I then asked him if he would notify me when Mr. Shumway came back, and he said he would, and that was the sum and substance of the conversation." (Tr. 219). And again, "the way he talked it seemed he was handling the affairs of Mr. Shumway." (Tr. 226). (Italics ours).

Engstrom reported his conversation to the officers and attorney of his company and a couple of days later Gene Cunningham, the attorney for the company, also saw Carl Gibson, stating it had been his intention to immediately sue the company. Gibson asked him not to do that and said: "Don't do that. Mr. Shumway is now on the Coast recuperating from *an illness and I will get him right back here.*" (Tr. 229). A few days later Shumway returned and Cunningham saw him at Gibson's desk in the bank, talking to Gibson (Tr. 230). On the 26th of August the Grand Avenue Lumber Company made a payment on account of this claim to the Arizona Sash, Door & Glass Company of $1562.70 (Tr. 124). It continued to extend credit based on the belief of Engstrom from his conversation with him that Carl Gibson was handling Shumway's affairs (Tr. 219).

On September 20, 1937. the Grand Avenue Lumber Company, through Shumway, made application to the Valley National Bank for a loan of $20,000 (Tr. 312). At that time the loan sheet showed $6500 was owing by the Grand Avenue Lumber Company to the bank (Tr. 155). The loan of $20,000 was refused *solely on the recommendation of Carl Gibson* (Tr. 311, 318). The records of the bank, produced on the trial, merely showed with respect to this application the notation "too large for the capital" (Tr. 312). All the officers of the bank who testified said unhesitatingly that no officer of the bank other than Carl Gibson had any connection with the transaction, and none had personal knowledge of same, and the loan was refused by the loan board on his written memorandum without discussion. So far as the records disclosed, no investigation was made by the bank of its loan

account except such investigation as might have been made by Carl Gibson and routine "statements" twice a year (Tr. 308, 311, 318). Carl Gibson died before the trial of the case (Tr. 118).

On October 13, 1937, twenty-three days after the application for this $20,000 loan and its refusal by the bank, the loan sheet shows the Grand Avenue Lumber Company paid to the bank its note of $3,000 with interest, *thirty days before its due date* (Tr. 155). Although the check in payment of this note is dated October 7, 1937 (Tr. 130), it apparently did not clear the note teller's window until the 13th (Tr. 155), on which date payment was credited. The payment was made on the order of Mr. Shumway (Tr. 129), although at that time the company was unable to meet its current obligations (Tr. 144).

During September or October of 1937, the Grand Avenue Lumber Company also negotiated with the Occidental Life Insurance Company for a loan of $20,000 and after investigation that loan was refused (Tr. 147, 149).

The bankrupt was insolvent for three months before November 22, 1937 and its condition was disclosed by its books (Tr. 200, 214). On November 22, 1937, the deficiency in the company's assets at a fair valuation to meet its liabilities was not less than $20,000 (Tr. 175, 200). It had been losing money from about May 1st of that year (Tr. 209) and had difficulty over credit because of inability to pay current bills from May 1st up to the time of the receivership on November 22nd. Several concerns cut off credit altogether during that period and during September, October and November, 1937, the company

was having difficulty in getting materials for jobs (Tr. 182, 184). Suits were threatened during this period (Tr. 294).

As of November 22, 1937, the books showed total accounts receivable were $57,975.90, and the accounts payable were $59,240.28 (Tr. 82, 101). Many of the accounts receivable were then three or four months past due; some were secured by mechanic's liens and would involve litigation to collect (Tr. 100, 207).

On November 22, 1937, Shumway personally took to the bank all collections of the Grand Avenue Lumber Company which had been made for several days previous, deposited in the account of the Grand Avenue Lumber Company the amount of $3533.72 and immediately gave to the bank a check for $3532.99, paying up all indebtedness to the bank consisting of one note for $2,000 and another for $1500, together with interest, neither of which notes were due at that time. The check for this payment to the Valley National Bank had been signed in blank several days before by C. L. Wright, as treasurer, upon Shumway's instructions and by him given to Shumway (Tr. 131-138). It was handed to the bank by Shumway on November 22nd, but to whom it was delivered at the bank is not disclosed by the evidence (Tr. 322). The notes were delivered to Shumway but were never produced by him (Tr. 291). On the same day he made this payment, November 22nd, suit for receivership of the bankrupt was filed on Shumway's direction through a company of which he was vice president and a receiver was appointed but whether this had been done *before or after the payment* is also not disclosed by the evidence (Tr. 292).

As is noted in appellant's challenge to Finding XIII of the trial court, it was contended that the bank did not have reasonable cause to believe the debtor insolvent because it believed "Shumway who was not insolvent was standing behind it". There was no evidence whatever as to Shumway's solvency or insolvency. It was not an issue and this "belief", if the bank had it, could not alter its legal liability, for it presumably knew that Shumway was not liable for a corporation debt *since the bank took the precaution to get Shumway's personal signature on all its paper* (Tr. 314). That the appellate court took into consideration this entirely extraneous contention in arriving at its inference that the bank had no *knowledge* of insolvency is indicated by its language in the opinion that Shumway was a "man of some means" (Tr. 340). There was no evidence of Shumway's financial status and that he managed to do very well for himself out of the Grand Avenue Lumber Company during its brief existence (at the expense of creditors *other than the bank)* through receiving an exorbitant dividend on an inflated statement of profits (Tr. 213) does not, of course, justify any conclusion as to his actual "means".

The following instances of erroneous or confused statements of the facts, contained in the opinion of the appellate court (Tr. 338-344) are cited, together with applicable references to the record, showing the discrepancies in same.

(1) The statement in the early part of the decision (Tr. 339, line 8) that the payments in question were *not made to Carl Gibson*, vice president of the bank. This is only an assumption, not a fact established by the evidence.

There is no evidence in the record to show to whom these payments were actually made. Carl Gibson died subsequent to the payments and before the trial. The assistant cashier of the bank, who was also note teller in October and November, 1937, testified on direct examination that he "thought" he received the payments (Tr. 322) and on cross-examination testified:

> "Q. Mr. Boyd, you said you *thought* that those payments came through your hands. Do you have any independent recollection of it other than your records there? "A. Nothing but my records and the fact I was Note-Teller and received practically all the payments and I saw the loan journal sheets.
>
> "Q. There are others on that desk occasionally, are there? A. At that time, I believe there was.
>
> "Q. And you have no independent recollection of either of these payments, then? A. No. ma'am.
>
> "Q. The only thing you are testifying to in regard to those notes is from your records there and without any independent recollection of it? A. That is correct." (Tr. 323-324).

G. C. TAYLOR, vice president of the bank, testified (Tr. 308) that "the officer who would have had direct knowledge concerning this loan was Mr. Carl Gibson", and that (Tr. 311) "he (Carl Gibson) had all contacts with the borrower". And Mr. Shumway, who was the officer of the bankrupt who, it was shown, handled all business concerning these loans with the bank, testified with respect to his credit relations with the bank (Tr. 292) "I discussed all my business and the business I did and any concern I did business with,

with Mr. Carl Gibson at that time". And it is significant that although the check for the October payment is *dated* October 7th, it did not clear the teller's desk until the date of *October 13th.*

From all of this it will be seen that a reasonable person might perhaps more readily draw from the undisputed evidence the conclusion that the payments were made to Carl Gibson and by him turned in to the note teller than that they were actually made to the note teller at the window, and certainly from Shumway's statement above given they must have been *discussed* with Gibson. In any event, there is *no evidence* justifying the statement in the opinion that the payments in question were *not* made to Carl Gibson.

(2 The statement (Tr. 340) that "immediately after the payment of the second note to the bank on November 22, 1937, at the instance of S. B. Shumway, the business of the bankrupt was placed in the hands of an equity receiver appointed by a state court."

There is nothing whatever in the evidence to disclose that the business of the bankrupt was placed in the hands of a receiver *after* the payment of the notes, as the only evidence was that the receivership application, based on a suit on a debt commenced by another corporation of which Shumway had control was filed on November 22, 1937, the same day as the payment (Tr. 292). Nothing is revealed by the evidence as to the time of day of the filing of the suit or the payment to the bank. This is clearly an assumption of a material fact not shown by the record.

(3) The statement that S. B. Shumway was " a man of some means" (Tr. 340, line 2) is entirely a

deduction of the court as there was no evidence relating to the subject of Shumway's "means".

(4) The statement that certain liabilities were "scheduled in the receivership" at $60,816.72 (Tr. 340). No schedules of the receivership were even referred to in the evidence.

(5) The statement (Tr. 340) that "it was developed during the bankruptcy proceedings which were inaugurated January 12, 1938, that there were *two* other items of indebtedness owing by the company on November 22, 1937. One was for $4,039.01 evidenced by a promissory note payable to the Arizona Concrete Company. The other for $4,321.72 was due to the president of the bankrupt, S. B. Shumway".

The undisputed testimony of the trustee in bankruptcy (Tr. 169, 170) was that in addition to the liabilities listed in the bankrupt's schedules, which aggregated $69,177.45, (and which latter amount included the *two* items mentioned in the above excerpt from the opinion) he had found there were *three* additional items of indebtedness outstanding on November 22, 1937 to be added to that amount, one to R. G. Chipperfield in the amount of $4832.55, one to the Arizona Tax Commission for $694.00 and one to the Fidelity Life Insurance Company for $981.35, aggregating a total amount of $6,507.90 of indebtedness "developed during bankruptcy proceedings" *in addition to the amounts stated in the opinion.*

(6) The statement that "appellee claims at book value total assets of $76,958.76, liabilities of at least $75,685.35 on November 22nd 1937" (Tr. 340).

This is incorrect. The figures asserted by appellee,

based on undisputed evidence in the record and which were clearly stated therein and also in appellee's brief, showed items of $2557.77 for discounts and $375.79 for "prepaid insurance" to be deducted from assets scheduled by the bankrupt as $76,958.76, thus placing at "book value" the assets "claimed" by the appellee on November 22, 1937 at $74,025.20, instead of $76,958.76, as stated in the opinion, and showing a deficiency in assets to meet liabilities, *even at book value*, of $1660.15 on November 22, 1937. (Tr. 173, 174).

(7) The statement that "as late as June 30, 1937, the bankrupt paid a substantial dividend and *paid income taxes upon a profit of about $9000*" (Tr. 341).

Income tax was only paid on $4200 for the fiscal year ending June 30, 1937.

James A. Smith, a certified public accountant, on redirect examination (Tr. 213) testified as follows:

> "Q. Mr. Gust asked you about the apparent profit which was shown by the report that was filed or made as of June 30th, 1937, on which a dividend of $9,000.00 was paid. What were your findings in regard to the amount of profit or loss; was that a profit according——
>
> "A. My findings were that that profit was overstated by something like $4,800.00. Without going into any factor of bad debts or without going into the factor of actual inventory as against the estimated inventory used on the basis of the report of which Mr. Gust referred. I submitted those findings to the Department of Internal Revenue of the United States and to the Income Di-

vision of the State of Arizona *and asked for a refund of taxes that had been paid or were then stated as owing upon the income of $9,000.00, and in each case the two taxing bodies reinstated to us the amount of taxes which had been paid in error* based on the original computation of Mr. Bailey's report.

"Q. I mean the recovery of the taxes was the difference between what, your figures and Mr. Bailey's? A. About $4,800.00 difference."

There was no evidence in conflict with this.

(8) The statement inserted in the opinion on its modification order of June 19, 1940 (Tr. 341) reading as follows:

"Thus, bills receivable having a face value of $45,785.72, were appraised at $30,206.06, a reduction of $15,024.90."

contains a statment of only *part* of the appraisal of "accounts receivable" and omits other accounts receivable shown on the appraisal referred to (Tr. 282) aggregating $3614.34 at face value, appraised at $2,051.00. Thus a correct statement of the appraisal of the "accounts receivable", as shown by the record and which were all part of those listed in the schedules of the bankrupt as of a value of $57,975.90 (Tr. 165) would be "accounts receivable having a face value of $49,400.06, were appraised at $32,257.06, a reduction of $17,143.00" (Tr. 282, 289).

(9) The statement that "an expert accountant testified that the bankrupt made a profit *up to June 30, 1937*, but that *shortly thereafter it changed its method of doing business.*" (Tr. 342)

The testimony of the expert accountant referred to upon cross-examination was (Tr. 209) as follows:

> "Q. Was that your own testimony here, that you thought that it made money when it first organized? A. Yes, when it first organized, but *as of June 30th*, they had been losing money.
>
> "Q. Can you fix the time about when they began to lose money? A. I would fix the time at approximately *the first of May;* that is, the Spring of 1937, when they began to go into the expansion of building homes under the FHA and other plans of making concerted sales campaigns."

(10) The statement that "the expert accountant, called as a witness testified that there was no change in the method of doing business during the period under consideration which would give notice to a *casual observer* that the company was in any financial difficulty" (Tr. 342).

The testimony of the expert accountant under cross examination upon which this statement was evidently based was as follows: (Tr. 212).

> "Q. I refer now to November 22d, it was an operating concern? A. It was, yes.
>
> "Q. As far as any person, a casual person knew, not an expert such as yourself and so on, there was no way of knowing that they were not going along perfectly all right? A. I think a *casual observer*, yes, would have believed that the concern was going along all right *unless they made inquiry.*"

(11) The statement (Tr. 342) that "the loan of

August 12, 1937, of $2,000.00 was made by the appellant to the bankrupt while this matter was pending" (referring to the time the attorney for the Arizona Sash, Door & Glass Company spoke to Gibson about that matter).

The testimony of Gene Cunningham, attorney for the Arizona Sash, Door & Glass Company, as to the time when he saw Carl Gibson (Tr. 231) is as follows, "as well as I am able to, I would make it after the 17th of August, after the 17th of August and before the 24th". Thus it was *at least five days after* the loan was made before the attorney even went to see Gibson.

(12) The statement that a short time after August 26, 1937, a second payment of $900 was made to the Arizona Sash, Door & Glass Company (Tr. 342).

The evidence shows a payment of *$830.87* was made to that company on September 20, 1937 (Tr. 225), the only payment made after August 26th.

(13) The statement that an audit upon which "dividends were paid was brought to the knowledge of, and was considered by, the bank at the time two loans aggregating $2,000.00 were made by it to the bankrupt upon promissory notes with S. B. Shumway as comaker" (Tr. 341-342) is also inferential.

There is no evidence that this audit was "considered" by the bank at the time any particular loans were made. It was testified in connection with the application for the loan of $20,000, *which was refused on September 20, 1937*, merely that the audit was in the file of the bank (Tr. 313, 317).

(14) The statement that (referring to the application for loan of $20,000 from the bank on September 20, 1937) "as this loan was larger in amount than the stock carried by the bankrupt" (Tr. 343).

There was no evidence in the record of what amount of stock was carried by the bankrupt, on or before September 20, 1937. The only evidence in the record concerned stock on hand and inventoried as of *November 22, 1937*, at the time of the receivership (Tr. 144) and was set forth in schedules of the bankrupt not filed until March 8, 1938 (Tr. 102).

(15) The statement that "the appellant had no knowledge of impending receivership at the time it accepted the payment of November 22nd. Several of the officers of the bank who had to do with the credit departments of the bank were called by the defendant, *including the one to whom the payments in question were made*" (Tr. 343).

The following is testimony of officers of the bank as shown by the record:

G. C. TAYLOR (Direct)

"Q. Are you testifying from your personal knowledge of this loan or from the records only?

"A. The Witness: I am testifying from the records of the bank.

"Q. You have no personal knowledge of the making of this? A. Except as a routine matter. All loans handled are through an Executive Committee.

"Q. Who was the one with whom—by whom those loans were made; what official of the bank?

"A. Mr. Gibson." (Tr. 304, 305).

"Q. Mr. Taylor, did you at any time have any knowledge of the fact that the—there was going to be a receivership with this company prior to the date the last payment was made? A. I did not. (Tr. 307).

"Q. Do you have any recollection of anything being brought up concerning this loan? A. I do not.

"Q. The officer who would have had direct knowledge concerning this loan was Mr. Carl Gibson? A. Correct.

"Q. And is he now deceased? A. Correct. (Tr. 308).

CROSS EXAMINATION

"Q. And you testified, I believe before, that these loans were all made through Mr. Gibson? A. That is right.

"Q. And he was the one who investigated the credit for this particular loan, is that correct? A. *He had all contacts with the borrower.*

"Q. And the loan was passed on by the committee, on his recommendation, generally speaking? A. That is correct, yes." (Tr. 311).

JOHN G. BOYD (Direct)

"Q. I will ask you if you are the man who received the payments that were made on the notes of the Grand Avenue Lumber Company during those two months? A. I *think so*, yes, sir.

"Q. Have you the record there showing the payments made on October 13, 1937? A. Well, *I find a note of $3000.00 was paid that day.*

"Q. Did you receive the money? A. Yes, sir; *I think I did.*

"Q. At that time, did anything come to your attention concerning the matter that you thought unusual? A. No, Sir." (Tr. 322).

CROSS EXAMINATION

"Q. Mr. Boyd, you said you *thought* that those payments came through your hands. Do you have any independent recollection of it other than your records there?

"A. Nothing but my records and the fact I was Note-Teller and received practically all the payments and I saw the loan journal sheets.

"Q. There are others on that desk, occasionally are there? A. At that time, I believe there was.

"Q. And you have no independent recollection of either of these payments, then? A. No, ma'am.

"Q. You said, I believe in answer to Mr. Gust's question, that there was nothing unusual in paying a note before it is due. Would you think it was unusual to pay a note before it was due on the same day that a petition in receivership was filed? A. If I knew it, I think it would be a little bit unusual.

"Q. It was not customary, then? A. No. I would say it was not.

"Q. The only thing you are testifying to in regard to those notes is from your records there and without any independent recollection of it? A. That is correct." (Tr. 323, 324)

H. L. DUNHAM (Direct)

"Q. You were present at the meetings? A. Yes.

"Q. At all those meetings, was the matter of the loan of the Grand Avenue Lumber Company brought up for discussion? A. Other than the application that Mr. Taylor mentioned?

"Q. That is, the application for a loan? A. The application for a loan, but for the loan itself that occurred, I do not remember." (Tr. 318). (Italics all ours)

From this it will be seen that the testimony referred to in the opinion was wholly negative and that it is incorrect to say it included the "one to whom the payment were made" since there is no evidence as to whom payment was actually made.

Two other manifest errors of statement contained in the original opinion and pointed out in appellee's motion for rehearing were corrected by the modification of June 19, 1940. One of these was a misstatement in appraisal figures involving many thousands of dollars of valuation (Tr. 346), and, as stated above, only *part* of the appraisal figures of "accounts receivable" is given through the modification in the opinion as it now stands.

It is therefore urged that the appellate court so misinterpreted and failed to properly evaluate undisputed, competent evidence shown by the record, and upon which the trial judge who heard the testimony based his findings of fact, as to call for the exercise of the supervision of this court in the interests of justice to the creditors of a bankrupt estate. Not only does it appear that much material evidence was wholly ig-

nored but the opinion discloses an assumption as facts of many matters which an examination of the record will show are clearly incorrect, while others are shown to be entirely conclusions, without any evidence whatever to justify them.

Although some of these erroneous statements, which will be considered later, might seem immaterial to the findings, yet others go to the very core of the proof necessary to establish voidable preferences, and taken together and in connection with the other material testimony which was obviously disregarded, they clearly indicate that not only was the evidence most *casually* examined and its true purport quite confused, but that it was considered upon a wrongful hypothesis of the extent of the burden of proof placed on the trustee in order to establish a voidable preference, predicated upon the mistaken assumption that the trustee was required to prove both that the bank had knowledge of "intent to prefer" by the payment (which is entirely unnecessary) and "knowledge of insolvency of the debtor" rather than "reasonable cause to believe" the debtor insolvent,—the latter being the language of the Bankruptcy Act and a matter which may be established by proof of *notice of facts sufficient to put a prudent man on inquiry* if such an inquiry would have revealed insolvency, as has been long recognized by the weight of authority.

Carl Gibson was no "casual observer" of the affairs of this company for the evidence disclosed a close relationship with the president of the bankrupt over a period of the entire life of the concern, shown by the testimony of the bankrupt's president "I discussed all my business and the business I did and any concern

I did business with, with Mr. Carl Gibson at that time" (Tr. 292), and by the testimony of Gus Engstrom the creditor who consulted Carl Gibson about the financial responsibility of the bankrupt that "the way he talked it seemed he was handling the affairs of Mr. Shumway" (Tr. 226). That an investigation would have disclosed hopeless insolvency over a period of many months to anyone *who made inquiry* cannot be seriously suggested.

It is also urged that the plain meaning and intent of the provision of Rule 52 (a), Federal Rules of Civil Procedure, with respect to actions tried upon the facts without a jury that "findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses" were entirely disregarded and that the appellate court in effect substituted its judgment on facts for that of the trial court and without a clear and correct understanding of those facts. No error was assigned to the admission of any of the evidence, and it was undisputed. Much of it consisted of figures going to valuations contained in voluminous schedules and records, which were introduced in connection with oral testimony of witnesses concerning the same. A proper understanding of the entire evidence from the cold pages of a record necessitated an exhaustive and painstaking examination and consideration, and even then could not be as well understood as by anyone hearing the testimony with the references pointed out by the witness.

The language of Rule 52 (a), Federal Rules of Civil Procedure, indicates that an appellate court before assuming to hold a finding of fact of a trial judge who

heard and considered all the evidence to be "clearly erroneous" because its viewpoint differs from that of the trial judge on the conclusions which might be drawn from unchallenged evidence, should unquestionably have a clear, correct and considered concept of all the evidence upon which the trial judge based his finding and of the applicable provisions of the Bankruptcy Act of the proof required to sustain it.

Certainly under the rule laid down by this Court prior to the adoption of Rule 52, of the Federal Rules of Civil Procedure, and consistently adhered to in an unbroken line of decisions that where a case is tried by the court, a jury having been waived, *its findings upon questions of fact are conclusive and not subject to revision by circuit courts of appeal*, the action of the appellate court would clearly be erroneous.

Petitioner submits that the judgment of the Circuit Court of Appeals, reversing the judgment of the trial court based on findings of fact, thereby promulgating a rule which places an incorrect and unnecessary burden of proof upon the trustee in bankruptcy in establishing a voidable preference, and failing to consider and properly evaluate competent, material evidence in the record as is clearly shown by the language of its opinion, is so clearly erroneous as to call for the exercise of the power of supervision of this Honorable Court.

QUESTIONS WHICH PETITIONER SEEKS TO HAVE DETERMINED BY THIS COURT.

FIRST: Was the burden placed upon the trustee in bankruptcy, in order to effect a recovery from a bank of a voidable preference under the provisions of Sec-

tion 60b of the Bankruptcy Act of 1898, as amended to June 26, 1936, to establish that the bank had "knowledge, actual or constructive, that the payments made to it *were intended as a preference*," all the other elements of voidable preference being admittedly established and the language of the said Bankruptcy Act providing that the trustee may recover "if the person receiving it or to be benefited thereby, or his agent acting therein, *shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference*"?

SECOND: Must a trustee, in order to recover from a bank a payment otherwise voidable as preferential, establish "*knowledge*" by the bank of the debtor's insolvency at the time of payment, or is it sufficient if he establishes that facts were known to the officer of the bank who was handling the loans to the debtor at the time of the payment that would have put a reasonably prudent person upon inquiry and that such an inquiry would have disclosed insolvency?

THIRD: Does Rule 52 (a) Federal Rules of Civil Procedure, providing that "findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses", change the rule long established by this Court that the findings of the trial court, where a jury has been waived, are conclusive upon questions of fact, and permit the Circuit Court of Appeals to substitute its judgment on facts for that of the trial court because it draws different inferences from facts from those drawn therefrom by the trial court, and where its inferences are

based on an erroneous conclusion as to the facts required to be proved to sustain the judgment?

REASONS FOR GRANTING WRIT.

Your petitioner urges the following reasons for the allowance of the writ:

FIRST: That the said court has decided a Federal question, to-wit, a construction of Section 60b of the Bankruptcy Act of 1898, as amended to June 26, 1936, in a way which is untenable and probably in conflict with the decision of this court in Cunningham vs. Brown, 265 U. S. 1, by holding that it was necessary for a trustee in Bankruptcy, in order to prove a voidable preference, to establish that the one receiving the transfer had knowledge that it was intended as a preference, notwithstanding the plain and unambiguous language of the Bankruptcy Act then in effect that a transfer may be avoided by a trustee if the one receiving it or to be benefited thereby has reasonable cause to believe the enforcement of the transfer would effect a preference, thus laying down a rule which places upon a trustee a wholly unnecessary and unfair burden of proof, which does and will prevent the just and equitable distribution of bankrupt estates for the benefit of all the creditors.

SECOND: That the said court has rendered a decision in conflict with decisions on the same matter, to-wit, the construction of Section 60b of the Bankruptcy Act of 1898, as amended to June 26, 1936, of the Circuit Court of Appeals, for the Third Circuit, in the case of In Re Star Spring Bed Co., 265 Fed. 133, and of the Circuit Court of Appeals, for the Seventh Circuit, in the case of Musk, et al. v. Burk, 58 Fed. (2d) 77, and of the Circuit Court of Appeals, for

the Sixth Circuit, in the case of Buchanan State Bank v. De Groot, 39 Fed. (2d) 397, by holding in effect that it was necessary for the trustee in bankruptcy, in order to recover a voidable preference, to establish that the one receiving the preference had knowledge the debtor was insolvent at the time of the transfer, rather than "reasonable cause to believe" him insolvent as prescribed by the Bankruptcy Act, then in effect, and which the above cited cases and many others have held is established by notice of facts which would put a reasonably prudent person upon inquiry and of all the facts an inquiry would have developed and does not require either knowledge or actual belief that the debtor is insolvent. The effect of the decision here is to relieve a transferee of any duty of ever making an inquiry and is a wrongful construction of the plain language of the Bankruptcy Act above quoted and conflicts with the construction long placed thereon by other courts.

THIRD: That the said court has decided an important question of Federal law, to-wit, a construction of Rule 52, of the Federal Rules of Civil Procedure, which has not been, but should be, settled by this court, by, in effect, substituting its judgment on facts for that of the trial court in an action tried by the court without a jury and where it is shown by the opinion it had considered the evidence upon a wrongful hypothesis of the burden of proof placed upon the trustee and because of such wrongful hypothesis of the extent of the proof required has drawn different conclusions from the evidence from those drawn by the trial judge.

FOURTH: That the said court has so far departed from the accepted and usual course of judicial pro-

cedure as to call for an exercise of this Court's power of supervision, in that it has reversed the judgment of a trial court based on findings of fact covering all the issues and supported by competent evidence in an action tried by the court without a jury, for the recovery by a trustee in bankruptcy of a voidable preference, without an adequate examination and consideration of the testimony which was heard and considered by the trial court, as is evidenced by the recitations in its opinion of facts assertedly shown by the evidence in the record and which an examination of the record shows are erroneous, and has totally disregarded other material, competent and undisputed evidence. That it has also promulgated a rule contrary to the established rule of the proof which is required in order to recover a voidable preference, which rule, if allowed to stand, will make it practically impossible for a trustee in bankruptcy to recover voidable preferences.

WHEREFORE, your petitioner prays that a Writ of Certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the said court to certify and send to this Court for its review and determination, on a day certain to be designated therein, a full and complete transcript of the record of all proceedings in the said Circuit Court of Appeals in the said case entitled Valley National Bank, a banking corporation, appellant v. Stephen Westover, trustee in bankruptcy of Grand Avenue Lumber Company, a corporation, bankrupt, appellee, No. 9415; and that said decree of the Circuit Court of Appeals, made and entered in said cause, on the 22nd day of May, 1940 and as modified on the 19th day of June, 1940, may be reversed by this Honorable

Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and that your petitioner will ever pray, etc.

STEPHEN WESTOVER,
Trustee in Bankruptcy of Grand Avenue Lumber Company, a corporation, bankrupt, Petitioner.

By ALEXANDER B. BAKER,
His Counsel.

ALICE M. BIRDSALL,
Of Counsel for Petitioner.

INDEX TO SUPPORTING BRIEF

AUTHORITIES CITED IN BRIEF

STATUTES CITED — BRIEF

RULES CITED — BRIEF

TEXTS CITED — BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No.....

STEPHEN WESTOVER, Trustee in Bankruptcy of Grand Avenue Lumber Company, a corporation, Bankrupt,

Petitioner,
(Appellee Below)

vs.

VALLEY NATIONAL BANK, a banking corporation,

Respondent,
(Appellant Below)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This petition is submitted under the provisions of Section 240, Judicial Code, U. S. C. A., Title 28, Section 347, as amended, and Bankruptcy Act of July 1, 1898, as amended up to June 26, 1936, United States Code, Title 11, Chapter 6, Section 96.

The petition contains a statement of the main facts pertinent to the questions presented. Those facts were

set up somewhat in detail therein, but as concisely as was deemed consistent with a fair presentation of the matter to this Court. In the interest of brevity they will not be further elaborated in this brief but reference will be made thereto in connection with the argument of the errors charged.

The opinion of the Circuit Court of Appeals was filed May 22, 1940, was modified on June 19, 1940, and judgment became final on the latter date when motion for rehearing was denied. It is officially reported in 112 Fed. (2d) 61, (Advance Sheets No. 1, July 8, 1940, and is printed in the Record, pages 338 to 344.)

SPECIFICATION OF ERRORS

1. The court erred in reversing the judgment for appellee for recovery of a voidable preference in bankruptcy and awarding judgment to the appellant "upon the ground that the trustee has failed to establish knowledge, actual or constructive, of the bank that the payments made to it were *intended as a preference*", for the reason that the trustee was not required by the Bankruptcy Act to establish any knowledge of an intent to prefer. (Italics ours).

2. The court erred in holding that it was necessary for the trustee in bankruptcy, in order to recover as a voidable preference payments to a bank, to prove that the bank had knowledge that the payments were preferential rather than to prove "reasonable cause to believe" that they would "effect a preference".

3. The court erred in substituting its judgment on facts for the findings and judgment of the trial court in an action which had been tried by the court without a jury, by reviewing the evidence on a wrongful hypothesis of the proof required by the statute to sustain recovery of a voidable preference, and disregarding competent, material evidence in the record which sustained the findings of the trial court.

ARGUMENT

Taking up the errors charged seriatim, petitioner presents:

FIRST

The court erred in reversing the judgment for appellee and awarding judgment to appellant "upon the ground that the trustee has failed to establish knowledge, actual or constructive, of the bank that the payments made to it were intended as a preference" for the reason that under the provisions of the Bankruptcy Act, as effective since 1910, no duty was placed upon the trustee to establish knowledge, actual or constructive, on the part of a transferee that payments received and claimed to be preferential were *intended* as preferential payments. The duty placed upon the trustee is only to establish "reasonable cause to believe that the enforcement of the transfer would *effect* a preference."

The ground upon which the judgment for appellee is reversed clearly shows error on the part of the court

in construing the provisions of the Bankruptcy Act with respect to the burden placed upon the trustee in bankruptcy in establishing a preferential payment.

Section 60b of the Bankruptcy Act, as amended to June 26, 1936, and which was in effect in 1937, U. S. Code, Title 11, Chapter 6, Section 96, reads as follows:

> "If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of a judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

In Gilbert's Collier on Bankruptcy (4th Ed.) page 888, the following statement is made of the change in the Bankruptcy Act under the 1910 amendment:

> "Under the section as amended in 1910, if the creditor knows or has 'reasonable cause to believe that the enforcement of such judgment or transfer would *effect* a preference,' the transfer is voidable by the trustee without regard to the intent of the bankrupt."

The change was recognized in the following language used by the court in Heyman v. Third Nat. Bank of Jersey City, 216 Fed. 685, 688:

> "Intent to prefer since the amendment of 1910 is no longer material. The effect of the transaction is substituted for the intent of the debtor. Actual knowledge or even actual belief that a preference will result is not required. Neither knowledge nor belief but reasonable grounds to believe is made the criterion of proof in such cases."

In Cunningham v. Brown, 265 U. S. 1, 10, this Court has stated the requirement of the Bankruptcy Act in this connection to be as follows:

> "In order that a preference should be avoided, its beneficiary must have reasonable cause to believe that the payment to him will effect a preference; that is, that the effect of the payment will be to enable him to obtain a greater percentage of his debt than others of the creditors of the insolvent of the same class."

It is most evident from the language used throughout its opinion by the United States Circuit Court of

Appeals that it was considering the facts from an erroneous viewpoint by placing upon the trustee the wholly unnecessary burden of proving *that the appellant knew that the payments were intended as a preference.* An instance is noted in its statement (Tr. 343) "as to whether or not the payments made by the bankrupt were intended to be preferential and must reasonably have been believed such, * * * they (referring to the officers of the bank who testified) all testified that they had no knowledge of the insolvency of the bankrupt at the time the payments were made by it to the bank and *that so far as they were concerned there was no intent to make or receive a preferential payment*". (Italics ours).

It, therefore, cannot be urged that the ground given by the court for reversal of the judgment of the lower court was a mere error in statement and that notwithstanding this error the court was considering the evidence with the correct conception of the proof required under the Bankruptcy Act. Furthermore, the reversal of the judgment of the trial court, stating the ground therefor, sets a precedent and places a definite limitation on future actions by trustees in bankruptcy who seek to recover voidable preferences in an effort to effect equitable distribution of bankrupt estates.

If findings of fact and judgments of trial courts in cases tried without a jury are to be set aside by an appellate court, it should at least be done without ambiguous or misleading statements, either of law or fact, so as to correctly guide future litigation on the same subject.

SECOND

The court erred in its construction of Section 60b of the Bankruptcy Act by holding that it was necessary for the trustee in bankruptcy, in order to recover as a voidable preference, payments made to a bank, to prove that the bank had *knowledge* that the payments were preferential rather than to prove "reasonable cause to believe" that they would "effect a preference."

It is urged by petitioner that the court erroneously held that some sort of knowledge on the part of the bank that the payments were "preferential" must have been established by the trustee in order to recover and that it wholly disregarded proof of facts and circumstances known to the officer of the bank who handled the transaction, sufficient to put him on inquiry which would have revealed insolvency. The opinion of the court clearly discloses that it considered no duty of inquiry devolved upon the bank but that the trustee was required to bring home to the bank proof of some knowledge or definite conclusion on its part of the actual insolvency of the bankrupt at the time of the payments. This is contrary to the well established rule laid down by other Circuit Courts of Appeal that one who receives a payment otherwise preferential, who has knowledge of facts that would put a reasonably prudent man on inquiry, is charged with the duty of making such inquiry, and if he does not make it, is charged with notice of all the facts such an inquiry would have revealed.

The following cases clearly state this rule:

In the case of In Re Star Spring Bed Co., 265 Fed.

133, 136, 137, and in which testimony of the bank's officers bears a striking similarity to that given by the appellant's officers in the instant case, the Court of Appeals for the Third Circuit held that under section 60b of the Bankruptcy Act it was the duty of the bank *to make an inquiry*, saying:

> "The bank urges however that even though the Star Company was insolvent at the time of the transaction and the assignment of the accounts operated as a preference, yet neither it nor its agents engaged in the transaction then had reasonable cause to believe that the transfer of the accounts would effect a preference. In support of this contention the president and the cashier of the bank, the agents through whom the transaction was consummated testified that they then had neither knowledge nor belief that the Star Company was insolvent. Such evidence, however, is neither controlling nor, of much, if any weight; for under Section 60b of the Bankruptcy Act if the facts surrounding and attending the transfer were such as to cause a reasonably prudent man to believe that the bankrupt was insolvent or were such as to put such a person on inquiry touching the solvency of the debtor and such an inquiry would have disclosed insolvency, the transfer is voidable. * * * More obvious indications of insolvency it would be difficult to conceive; but "if these facts would not alone give to the bank reasonable cause to believe that the Star Company was insolvent they were more than sufficient to put it on inquiry. * * * It was the

> bank's duty under the law to make such inquiry, yet it accepted the assignment and completed the transaction without investigation. Notwithstanding its inaction, it is chargeable with such knowledge as the investigation would have disclosed. *Lethargy under such circumstances is not rewarded by the law.*" (Italics ours).

And it must be borne in mind that in the Star Spring Bed Company case the court held the testimony of the officers of the bank who handled the transaction that they had neither knowledge nor belief the debtor was insolvent, to be of little weight, while in the instant case the court held in effect that the testimony of officers of the bank who admittedly had no connection with the transaction—the officer who handled it being dead—that they had no knowledge of insolvency, or of "intention to prefer," was controlling as proof that the bank neither "knew nor should have known" the payment was preferential. This, petitioner contends, was erroneous.

The Circuit Court of Appeals for the Seventh Circuit in the case of Musk, et al. v. Burk, 58 Fed. (2d) 77, 79 in passing on the notice of circumstances inciting inquiry by one charged with receiving a voidable preference, used the following language:

> "That a preferential transaction shall be deemed voidable does not require that the person to be benefited should know that the result of the transaction would be to effect a preference, but it will be sufficient if the person preferred, or

his agent therein, have knowledge or notice of facts and circumstances that would incite a person of reasonable prudence under similar circumstances to make inquiry, as he is thereby charged with notice of all the facts which a reasonably diligent inquiry would develop. Collier on Bankruptcy (13th Ed.) 1300-1302; Essex National Bank v. Hurley, 16 F. (2d) 427 (C. C. A. 1); Coder v. McPherson, 152 F. 951 (C. C. A. 8).

"We believe that the District Court was warranted in its conclusion that a reasonably diligent inquiry here by the appellants or their agent in the community where they knew the bankrupt lived and had lived for twenty years would have disclosed the major portion of his indebtedness to others, and that the transaction would effect a preference."

Likewise the Circuit Court of Appeals for the Sixth Circuit, in the case of Buchanan State Bank v. De Groot, 39 Fed. (2d) 397, 398, in affirming the judgment of the District Court, and referring to a finding made by a referee in bankruptcy which was concurred in by the District Court, that:

"Facts within the knowledge of the cashier charged the bank with the duty of making inquiry touching the bankrupt's finances, which inquiry would have disclosed his insolvency and the preferential character of the assignment."

stated the rule in such cases as follows:

"This finding, concurred in by the District

Court, will not be set aside upon anything less than a demonstration of plain mistake. * * *

"There is no finding that the bank had actual knowledge of the insolvency when it took the transfer, but this is not necessary. In re States Printing Co., 238 F. 775 (7 C. C. A.); Boston Nat. Bank v. Early, supra. Equally inconclusive of the issue was the bank's evidence that it had no ground to believe the bankrupt was insolvent, in view of the finding, amply supported, as we think, by the testimony, that it had reasonable cause to believe that the use of the assignment would result in a preference, and had knowledge of facts putting it upon inquiry which would have disclosed Ross' insolvency and the preferential character of the transaction."

And in the case of Levy v. Weinberg & Holman (2 C. C. A.) 20 Fed. (2d) 565, 567, it was said with respect to the duty of a creditor to make an inquiry where he denies knowledge regarding a preferential transfer:

"It is argued that because the defendant denies knowledge, and there is no direct testimony to contradict his denial, there is no evidence to support a decree for the complainant. We cannot accept this contention. A creditor may not willfully close his eyes in order to remain in ignorance of his debtor's condition. It is incredible that Weinberg made these loans without any inquiry, if he had no knowledge of the bankrupt's circumstances."

Reviewing the requirements of the statute with regard to establishment as voidable of transfers condemned as preferential, the Circuit Court of Appeals for the Sixth Circuit said in Prudential Ins. Co. of America v. Nelson, 96 Fed. (2d) 487, 491:

> "Likewise must we reject the contention that the appellant had no reasonable cause to believe the bankrupt to be insolvent and that the payment would operate as a preference. * * * The statute condemns a transfer as preferential when the transferee has reasonable cause to believe that the transferor is insolvent and that it will effect a preference. It sets up a practical test, one with which courts are familiar and which in other transactions is frequently applied. If reasonable cause to believe a transferor insolvent and his transfer preferential in effect must wait upon complete audit and appraisal of a bankrupt's affairs, preferential transfers would rarely exist and the statutory protection to creditors be unavailing. Here were the signs which to a careful creditor pointed unerringly to a critical stage having been reached in its debtor's affairs"

See also:

Pender v. Chatham Phenix Nat. Bank & Trust Co. (2 C. C. A.) 58 Fed. (2d) 968;

Boston Nat. Bank v. Early (1 C. C. A.) 17 Fed. (2d) 691;

Brown Shoe Co. v. Carns, (8 C. C. A.) 65 Fed. (2d) 294.

That the operation of a payment as a preference must be determined by the actual effect of the payment as determined when bankruptcy resulted has been decided by this court in the case of Palmer Clay Products Co. v. Brown, 297 U. S. 227, 229, 80 L. Ed. 655, in which Justice Brandeis stated the matter as follows:

> "Whether a creditor has received a preference is to be determined, not by what the situation would have been if the debtor's assets had been liquidated and distributed among his creditors at the time the alleged preferential payment was made, but by the actual effect of the payment as determined when bankruptcy results. * * *
>
> A payment which enables the creditor 'to obtain a greater percentage of his debt than any other of such creditors of the same class' is a preference."

Reference is here made to the statement in the opinion of the Court (Tr. 340) that the receivership suit was filed on Shumway's direction on November 22, 1937, *after* the payments to the bank on that day of the two unmatured notes. This, as has been pointed out before is sheer conjecture as there was *no evidence whatever* as to the time of day of either incident. The appellate court apparently used this unwarranted assumption as a basis for its conclusion that the bank did not have *constructive knowledge* of the receivership when it accepted the payments on November 22nd. Of course if the suit was already filed when the payment was made, the bank had *constructive* notice of it, whether or not it had actual knowledge. While peti-

tioner believes the many other facts shown unmistakeably point to a situation which brought the bank within the requirement of the Act in putting it upon inquiry, if not giving it actual knowledge, as to the financial condition of the bankrupt, yet this statement is noticed because it illustrates the presumptions which the Court indulged in setting aside the findings of the trial court. It is a fact so well known that any court must take judicial notice of it that the filing of a receivership suit would require some forethought and preparation and it obviously was not decided upon by Mr. Shumway, prepared by his counsel and filed in court all after banking hours commenced on November 22nd. Furthermore there is Mr. Shumway's naive statement "I discussed all my business with Carl Gibson at that time" (Tr. 292). That statement was made by Shumway, a hostile witness called by the trustee, as the record discloses, directly after he had been questioned regarding his connection with the receivership filing. It cannot be presumed by anyone to mean anything less than its clear language indicates,—that he discussed the receivership with Carl Gibson. It is noticeable that he was not cross-examined by counsel for the bank on this matter.

From the facts clearly established, and cited in the petition, the trustee contended it was indisputably shown that Carl Gibson was the agent of the bank in all the transactions the bank had with the Grand Avenue Lumber Company and that his association with the affairs of the company through its president, Shumway, was extremely close from the time of its inception. That he knew of the financial condition of the company and that current accounts were not

being paid is disclosed by his statement made to Engstrom, a creditor, in August of 1937, and the fact that he knew where Shumway was and was able to dictate that the latter should return at once to Phoenix in order to prevent action being taken against the company bespeaks more than the role of the "casual observer" which was referred to in the opinion of the appellate court (Tr. 342).

However, one who accepts payment in full of its debt from an insolvent while possessed of undeniable knowledge of outstanding debts due others cannot thus lightly escape its responsibility, for the Bankruptcy Act, designed to protect all creditors equally, places a duty of investigation and inquiry on him. The bank had notice of all facts which were known to Carl Gibson, its agent, and Carl Gibson had notice for sixty days before payment to the bank on October 13th of its unmatured note, that the company was unable to meet its current accounts, had been threatened with one suit, and was borrowing to keep its account sufficient to pay expenses, he was consulted by Shumway about *all his business and any concern he did business with* and had been asked by Shumway just twenty-three days before this payment for a loan to the company of $20,000, which *Gibson refused* for the bank. To assume, as did the court in its opinion, that the only reason for this refusal by Gibson for the bank was "because it was too large for the capital" and that no inquiry was made as to the condition of the company or the reason for his good friend Shumway, who admittedly *talked over all business of the company with him*, asking for such a loan when the company at that time owed $6500 to the bank, is to do violence to the

well-known custom of "prudent" bankers. And to assume that Gibson did not know all about these payments would seem quite unreasonable in view of Shumway's testimony. However, since the payments *were* made and the bank records so showed, the bank was charged with notice. And whether or not Gibson made an investigation, which certainly would have revealed insolvency, is immaterial, for he *was charged with the duty*—and through him the bank *was so charged*—of making such investigation because he had knowledge of facts which should have put any prudent person—let alone a banker—upon inquiry.

Bankers in small communities (as was well-known to the trial judge who undoubtedly took judicial notice of that fact) keep in close touch from day to day with the affairs of those to whom they are extending credit. Indeed this was revealed by the testimony, quoted above, of Gus Engstrom, manager of a local concern, a creditor of the bankrupt, who sought out Carl Gibson, the banker, and asked him to advise him of the financial standing of this company.

While it was urged by appellant, as an indication that Carl Gibson did not believe the condition of the company to be dangerous during August, 1937 when he had his talks with Engstrom and Cunningham, that he loaned the bankrupt an additional $1500 on August 31st, bringing the total of the company's indebtedness to the bank to $6500, it is perhaps a singular coincidence that this $1500 was approximately the same amount that was paid to Engstrom's company to prevent suit being filed against the bankrupt, and it must always be kept in mind that the bank required

Shumway's personal signature on all the notes of the bankrupt. It is also most significant that less than thirty days after this $1500 loan was made, Shumway applied to Gibson for a twenty thousand dollar loan *which was refused* and that only a short time thereafter, and in fact only about five weeks after the bank had so graciously made this new loan of $1500, it received payment of its $3,000 note from the bankrupt, *thirty days before it was due.* To analyze what happened, therefore, it may be said that Carl Gibson (who knew in August of one creditor who was threatening suit against the bankrupt and of "several other accounts" against it "in the same condition") made a loan to the bankrupt of a sufficient amount to stave off suit by the one creditor, giving the company a chance to continue operating for a few weeks more, while the bank prudently collected all of its unmatured notes and so saved Shumway, the bankrupt's president (who discussed all his business with Gibson) from personal liability on these notes.

The bank cannot claim ignorance of facts, nor immunity from performance of its duty, because Carl Gibson, its agent in the matter, had died before the trial of this case. The fair and impartial enforcement of the Bankruptcy Act for the protection of all the creditors of a bankrupt estate demands that death shall not be used as a shield to prevent the recovery of unlawful preferences, and undisputed evidence in the record should not be so aided by purely speculative inferences, as to relieve the bank from the responsibility with which it was indubitably charged through its deceased officer and agent.

As was said by Chief Justice Taft in the Cunningham v. Brown case, supra, the principle that "equality is equity" is the "spirit of the bankrupt law", and it is contended by petitioner that here as there, the bank in its successful "race of diligence", inspired by its inside knowledge of facts and conditions, violated the spirit of the Act and secured an unlawful preference.

THIRD.

The court erred in reversing the judgment of the trial court and in effect substituting its judgment on facts for the findings and judgment of the trial court in an action which had been tried by the court without a jury, thus setting aside the finding of the trial court, which was sustained by substantial and competent evidence, that the appellant bank had reasonable cause to believe at the time the questioned payments were made to it that the bankrupt was insolvent, and that the payments would enable it to secure a greater percentage of its debt than other creditors of the same class.

The trial court heard and considered all the evidence and its findings admittedly covered every element of voidable preference. The insolvency of the bankrupt for a considerable period of time before the payments were made must be conceded. The evidence adduced on the part of the trustee in bankruptcy to sustain the finding of fact that the bank had reasonable cause to believe the payments to it would effect a preference is shown in the record and citation to this persuasive evidence has been given in the petition

for the Writ of Certiorari. The Circuit Court of Appeals, as is unquestionably disclosed by the language in its opinion, wholly disregarded a large part of this evidence, and obviously gathered a confused understanding of other parts of the evidence as is shown by its erroneous statement of many purported facts, some fifteen instances of which are set forth in the petition.

This action of the court is in conflict with the rule long established by decisions of this Court prior to the adoption of the Federal Rules of Civil Procedure that the findings of fact of a trial court in a case tried without a jury where special findings are made, are conclusive and not subject to review by Circuit Courts of Appeal, if there were *any* evidence to support the findings.

In the case of Stanley v. Board of Supervisors, 121 U. S. 535, 547, 30 L. Ed. 1000, this court laid down that rule in the following language:

> "Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here; it matters not how convincing the argument that upon the evidence the findings should have been different."

That rule was approved in the case of Dooley v. Pease, 180 U. S. 126, 131, 45 L. Ed. 457, 460, in the following language:

> "Where a case is tried by the court, a jury having been waived, its findings upon questions

of facts are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different. Stanley v. Albany County Supers., 121 U. S. 547, 30 L. Ed. 1002, 7 Sup. Ct. Rep. 1234.

"Errors alleged in the findings of the court are not subject to revision by the circuit court of appeals or by this court, if there was any evidence upon which such findings could be made. (citing cases)."

Citing the case of Dooley v. Pease, supra, with approval, this Court reaffirmed the rule in the case of United States v. Jefferson Electric Mfg. Co., 291 U. S. 386, 407, 78 L. Ed. 859, 874, in the following language:

"We think there was such evidence. There was conflict in it; parts of it admitted of diverging inferences; and as to some matters the preponderating weight was difficult of ascertainment. But these were all matters for the trial court to determine. It was exercising the functions of a jury and its findings are on the same plane as if embodied in a jury's special verdict."

It is true that the Circuit Court of Appeals here stated in one place in its opinion that there was *no evidence* to support the finding of the trial court "that the appellant knew or should have known that the payment was preferential". There was, of course, no finding by the trial court couched in this language, which does not conform to the requirement clearly set out in the Bankruptcy Act, but it probably referred

to find numbered XIII (Tr. 42), set out in full in the petition. However, in view of the erroneous statement of the appellate court of the evidence in the record, as pointed out heretofore, and in view of its disregard of other substantial and material evidence, which has likewise been pointed out, and in view of its manifest belief that an unnecessary burden of proof was placed upon the trustee, such a statement must clearly be taken as erroneous and not in accordance with the record itself. The only basis it seems to have had for such statment was that it drew different inferences and—petitioner urges, entirely unwarranted inferences,—from undisputed facts, from the inferences drawn therefrom by the trial court, often, as is shown, by a complete misconception of the facts themselves. Petitioner urges that these inferences were not correct presumptions from the facts actually shown if a proper construction were given to the requirements of the proof necessary to establish a voidable preference.

Whether the language of Rule 52 (a), Federal Rules of Civil Procedure, shall be construed as enlarging the functions of the appellate courts so as to permit a Circuit Court of Appeals to substitute its judgment on facts for that of the trial court, as was unquestionably done here, thus changing the rule long established by this court and cited above, is one of the questions petitioner presents here.

It would seem that Rule 52(a) was meant to be merely a restatement of the long established rule laid down heretofore.

It is a rule based on reason and common sense and its limitations on the power of review of facts by appellate courts should not be set aside save for grave reasons. Whether Rule 52 (a) is to be construed as a departure from that rule is for this Court to determine.

CONCLUSION

Petitioner, therefore, respectfully submits that the United States Circuit Court of Appeals for the Ninth Circuit, by setting aside a finding of fact of a trial court which was sustained by substantial and competent evidence, without having adequately considered all the evidence on which the trial court based its findings and judgment, and upon an erroneous interpretation of the proof required by the Bankruptcy Act to sustain the findings, has so far departed from the accepted course of judicial prodecure as to call for the exercise of this Court's power of supervision, and that this is a proper case for the issuance of this Court's Writ of Certiorari.

Respectfully submitted,

ALEXANDER B. BAKER,
Counsel for Petitioner

ALICE M. BIRDSALL
Of Counsel

APPENDIX

Rule 52, Federal Rules of Civil Procedure:

RULE 52. FINDINGS BY THE COURT

(a) Effect. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

RULES OF PRACTICE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Effective September 16, 1938

RULE 21—FINDINGS

In all actions in which findings are required, the prevailing party shall prepare a draft of the findings and conclusions of law within 5 days after the rendition of the decision of the court, if the same was in the presence of counsel, otherwise within 5 days after notice of the decision. Such draft of the findings and conclusions of law shall be filed with the clerk and a copy thereof served upon the adverse party, who shall within 5 days thereafter file with the clerk and serve upon his adversary such proposed amendments or additions to the findings as he may desire. The findings shall thereafter be deemed submitted and shall be settled by the judge and when so settled shall be engrossed by the prevailing party within 5 days thereafter and shall be then signed and filed. No judgment shall be entered in actions in which findings of fact and conclusions of law are required until the findings and conclusions have been settled and filed. A failure to file proposed findings of fact and conclusions of law and take the necessary steps to procure the settlement thereof shall be grounds for dismissal of the action for want of prosecution at a call of the general calendar.

Supreme Court of the United States

October Term, 1940

No. 294

STEPHEN WESTOVER, Trustee in Bankruptcy of Grand Avenue Lumber Company, a corporation, Bankrupt,

Petitioner,

(Appellee Below)

vs.

VALLEY NATIONAL BANK, a banking corporation,

Respondent,

(Appellant Below)

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT—INDEX

TABLE OF CASES CITED

None

OPINIONS DELIVERED

Trial Court wrote no opinion.

The opinion of the Circuit Court of Appeals is officially reported in 112 Fed. (2d) 61, and is printed in the Transcript of Record pages 338-344.

JURISDICTION OF SUPREME COURT

It is admitted that this Court has jurisdiction of this case on certiorari.

It is submitted, however, that no ground for review is presented under Subdivision 5 of Rule 38 of this court.

STATEMENT OF CASE

This is an ordinary case by a Trustee in Bankruptcy to recover two payments of money to a bank by the alleged bankrupt within four months of the adjudication in bankruptcy. It presents no novel proposition of law or fact.

Jury was waived by stipulation.

The trial court found in favor of plaintiff making the usual findings of fact and entering judgment for two payments of $3,040.00 and $3,532.99, respectively.

The defendant, Respondent here, took an appeal questioning, among other things, (1) the finding of insolvency at the date of the payment and (2) the finding that defendant had reason to believe that preference would be effected by the payments.

The Circuit Court of Appeals reversed the case upon the ground that there was no evidence to support the second of the two above mentioned findings. The evidence showed that the agent of the Bank who had charge of dealings of the bankrupt was deceased.

Petitioner, plaintiff below, marshalled certain circumstances in an attempt to create a suspicion that the Bank knowingly received the payments as preferences.

The Circuit Court of Appeals fully reviewed the evidence and held that such inference was not warranted by the evidence and reversed the case.

ARGUMENT

Petitioner sets up four grounds in support of his contention that this court should exercise its discretion in favor of a review by certiorari. These four grounds are set forth on pages 31-33 of the petition. Each and every one of these grounds depends upon the assertion and assumption therein that the Circuit Court of Appeals did something which it did not, in fact, do. A perusal of the opinion on pages 338-344 of the Transcript of Record is a sufficient answer to each and every one of these alleged grounds for review.

In his brief attached to the petition, Petitioner makes three specifications of error. (Petitioner's Brief, pages 2-3). The first and second of these specifications are based upon the proposition that the Circuit Court of Appeals decided the case upon the assumption that the Trustee in Bankruptcy to establish a prefer-

ence, must show that the alleged preferential trustee had knowledge of the intent to prefer by the bankrupt, instead of merely being required to show that such transferee had reasonable cause to believe that the transfers would effect a preference in its favor.

Reference to the opinion shows that the learned Court did nothing of the kind. On pages 338-339 of the Transcript of Record, the opinion states "the appellant challenges, among other things, the finding of fact of the trial court that it had reasonable cause to believe that the payments made to it would effect a preference. We think the evidence is entirely insufficient to support this finding," and on page 343 of the Transcript, the opinion, after considering in detail the circumstances that were relied on by the appellant to support the finding above mentioned, the Court states:

> "There is no indication in this circumstance which would reasonably require an inference of insolvency," and

further on page 343 of the Transcript of Record the Court states:

> "The explanation given by the Bank that it refused to make the loan because it was too large for the capitalization of the bankrupt is obviously well founded and involved no conclusion of insolvency," and

on the top of page 344 of the Transcript of Record, the opinion states:

> "We conclude that there is no evidence to justify the finding of the trial court that the appellant knew, or should have known, that the payment was preferential."

Thus far the Court's language is clear to the effect that it had in mind the correct Rule prescribed by the statute. After having thus decided the case, the Court states that there are other assignments which it does not find it necessary to consider because of the disposal of the case that it has made, but in making this statement the Court uses the language:

> "We are satisfied that the judgment must be reversed and judgment awarded the appellant upon the ground that the trustee has failed to establish knowledge, actual or constructive, of the bank that the payments made to it were intended as a preference."

Petitioner seizes upon this last language to support his assertion that the Circuit Court of Appeals proceeded upon an incorrect theory of the law.

If there is any inaptness in this incidental statement of the Court, it was caused by Petitioner himself. In his complaint he alleged:

> "The defendant, Valley National Bank, a Banking Corporation, had reasonable cause to believe and did believe, that at the time each of said transfers was made by said bankrupt, it was insolvent and that said transfers would effect a preference in its favor."

Transcript of Record, page 5.

It appears from said quotation that Petitioner did not content himself with alleging that the Bank had reasonable cause to believe, but went further and asserted that the Bank did believe—the equivalent of an assertion that it had actual knowledge.

Petitioner sought to insinuate throughout his brief in the Circuit Court of Appeals, as he now insinuates under the heading of "Statement of Matters Involved", pages 4 to 29 in the petition, that the Bank conspired with the bankrupt to receive these payments as a preference and in view of his attitude in that regard it is not strange that the Court stated that the evidence did not sustain that contention.

Petitioner's third specification of error is to the effect that the Circuit Court of Appeals substituted its judgment for the judgment of the trial court in reviewing and setting aside the finding of fact in question.

The Rule to be followed in reviewing such findings is set forth in Rule 52, of the Federal Rules of Civil Procedure (see page 23 Petitioner's Brief). That Rule in part reads as follows:

> "Findings of Facts shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses," and

Rule 52 (b)

> "When Findings of Facts are made in actions tried by the Court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the District Court an objection to such findings or has made a motion to amend or a motion for judgment."

The Circuit Court of Appeals in performing its duty under this Rule reviewed the evidence and reached the following conclusion:

> "We conclude that there is no evidence to justify the finding of the trial court that the appellant knew or should have known, that the payment was preferential."
>
> Transcript, page 344.

Petitioner by a lengthy statement in his petition, pages 4-29, asserts that the Circuit Court of Appeals did not properly perform this function. Most of his statements do not comply with the Rule of this court requiring the petitioner to point to the page of the record in support of his statements. It does not seem possible that this Court is in a position to accept the invitation to minutely search the record in the numerous cases that come before it on certiorari to ascertain whether the Circuit Court missed a detail here and there in reviewing the evidence. In this case the Circuit Court of Appeals, after reviewing the evidence, found that no inferences could be drawn from the facts to support the trial court's finding.

Rule 52 (a) does not require the appellate court to assume that the trial court is more expert at drawing inferences than the appellate court, nor can this court assume that counsel for Petitioner will state the case more accurately than the Circuit Court of Appeals.

The Petitioner by asking this Court to review the evidence to determine whether the Circuit Court of Appeals correctly grasped every item thereof in this case, is, in effect, proposing to abolish the Circuit Court of Appeals and impose upon this court the burden of reviewing all cases decided by the District Courts. Furthermore, if this court should undertake the task to review the evidence in detail it could only come to the conclusion that Petitioner is actuated by great hostility towards banks and presumes the Respondent guilty without evidence.

Respectfully submitted,

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